United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
John R. Hughes, Jr.

Docket No. **76-1382**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B p/s

UNITED STATES OF AMERICA

Appellee

v.

DUANE HARRIS

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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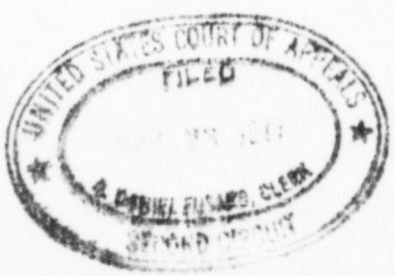

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PRELIMINARY STATEMENT

Duane Harris appeals from a judgment and conviction entered on August 3, 1976, after a nine-day trial before the Honorable Albert W. Coffrin, United States District Judge, and a jury. An indictment, bearing criminal number 75-73 and filed on October 9, 1975 was superseded by an indictment filed on October 23, 1975 bearing the criminal number 75-73-1 and charged Jay Leavitt, Wayne Holden, Norman Holden, Duane Harris and Bruce Garland in sixteen counts as follows: Count 1 charged defendants Leavitt, Wayne Holden and Harris with distribution and possession with intent to distribute

approximately 83 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count II charged defendant Wayne Holden with the use of a communications facility in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841,843(b); Count III charged defendants Leavitt, Wayne Holden and Norman Holden with distribution and possession with intent to distribute approximately 144 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count IV charged defendant Wayne Holden with the use of a communications facility in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841, 843(b); Count V charged defendant Wayne Holden with the use of a communications facility in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841, 843(b); Count VI charged defendants Leavitt, Wayne Holden and Norman Holden with distribution and possession with intent

to distribute approximately 330 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count VII charged defendant Wayne Holden with the use of a communications facility in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841, 843(b); Count VIII charged defendants Leavitt, Wayne Holden, Norman Holden and Garland with distribution and possession with intent to distribute approximately 308 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count IX through Count XIII charged Wayne Holden with the use of a communications facility in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841, 843(b); Count XIV charged defendants Leavitt, Wayne Holden, Norman Holden and Harris with distribution and possession with intent to distribute approximately 996 grams of amphetamine in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; Count XV charged defendant Leavitt with the use of a communications facility in committing and in causing and facilitating the knowing

and intentional distribution and possession with intent to distribute by Jay Leavitt, Wayne Holden and Norman Holden of a quantity of amphetamine in violation of 21 U.S.C. §§ 841, 843(b); Count XVI charged all defendants with conspiracy to manufacture amphetamine, conspiracy to distribute and possess with intent to distribute quantities of amphetamine and conspiracy to use communications facilities in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute quantities of amphetamine in violation of 21 U.S.C. §§ 846, 963.

The trial of defendants Wayne Holden, Norman Holden, Harris and Garland commenced on April 5, 1976 and continued until a mistrial was declared on April 8, 1976.*

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* Jay Leavitt's charges in criminal no. 75-73-1 were superseded by a seven count indictment bearing criminal no. 76-2 which was filed January 14, 1976. Leavitt entered a plea of guilty to all counts of the indictment on the third day of trial, June 10, 1976. Accordingly, the indictment 75-73-1 was dismissed as to Jay Leavitt on August 23, 1976.

The trial of defendants Wayne Holden, Norman Holden, Harris and Garland commenced with a new jury panel on May 4, 1976 and on May 12, 1976 the jurors returned a verdict of guilty on all counts* as to Wayne Holden (12 counts), as to Norman Holden guilty on Counts III, VI and XVI and not guilty as to counts VIII and XIV, as to Duane Harris guilty as to Counts I and XVI and not guilty to Count XIV and not guilty as to Bruce Garland on the two counts in which he was named. (Tr 858-62)**

On August 3, 1976 Judge Coffrin sentenced Duane Harris to the custody of the Attorney General for a period of two years on both counts I and XVI with a special parole term of two years, the sentence on each count to run concurrently.***

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* Counts XI, XII and XIII were dismissed by the Government on the first day of trial, May 4. (Tr 4-5)

** Tr refers to Transcript. Other references are:
JA - Joint Appendix;
DB - Defendant's Brief;
GX - Government Exhibit.

*** The sentence of the Court was stayed pending appeal.

On that same date Wayne Holden was sentenced to five years in the custody of the Attorney General on Counts I, III, VI, VIII, XIV and XVI, and a special parole term of three years, to four years in the custody of the Attorney General on Counts II, IV, V, VII, IX and X, all sentences to run concurrently with each other. Norman Holden was sentenced as a Youth Offender under 18 U.S.C. § 5010(b) and committed to the custody of the Attorney General for treatment and supervision until the time of discharge provided for under 18 U.S.C. § 5017(c).

STATEMENT OF ISSUES

I WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY?

II DID THE DISTRICT COURT PROPERLY ADMIT EVIDENCE THAT HARRIS WAS PART OF THE ORGANIZATION?

STATEMENT OF THE FACTS

In the light most favorable to the Government the jury could have found the following facts:

On June 5, 1975, Special Agent Harold Anderson, Jr., of the United States Department of Justice Drug Enforcement Administration, while acting in an undercover capacity, was in the Discotheque Bar of the Red Coach Motor Inn in Brattleboro, Vermont, at approximately 8:00 P.M. for the purpose of meeting with Wayne and Norman Holden. (Tr 22-23) The meeting had been arranged through a "cooperating individual," (Tr 23). At approximately 9:40 P.M. Agent Anderson observed Norman Holden, Wayne Holden and Duane Harris seated at a table in the far corner of the bar. (Tr 23) Agent Anderson seated himself in the bar area and sometime later he was approached by Wayne Holden.* (Tr 29) The three of them (Wayne Holden, Agent Anderson and the "cooperating individual") moved to a table and Agent Anderson was introduced to Wayne Holden as "Bob". (Tr 29-30) In response to a question by Agent Anderson, Wayne Holden indicated he (Holden) was the spokesman for the group and that

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* It seems that at this time Agent Anderson was attempting to avoid direct contact with Harris as he had met him before and was concerned Harris would recognize him as a Government Agent. (Tr 24-25, 29)

he would be the individual delivering the P2P* to the chemist.

The subject of conversation at the table concerned Wayne Holden's contact with the chemist, the return of amphetamine** for each bottle of P2P furnished, the yield that could be expected from a bottle of P2P and a possible purchase of the P2P rather than an exchange. (Tr 30-31) Wayne Holden stated that his role would be to deliver the P2P to the chemist and to be present during the manufacturing process and thus verify the amount of amphetamine made by the chemist from the bottle of P2P.

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* Phenol-2-propanone, an ingredient essential to manufacture amphetamine which is not in and of itself a controlled substance.

** The conspirators and other witnesses used the term "speed", "stuff", as well as others when referring to amphetamine. The term amphetamine is used throughout this brief for purposes of uniformity.

In response to a question concerning what Agent Anderson said about the presence of other people there that evening, Agent Anderson gave the following response:

> I expressed to Mr. Wayne Holden I was upset that other people were present, that I was not interested in meeting a lot of various individuals and he (Wayne Holden) assured me that one of the individuals was his brother (Norman Holden) who was part of the organization and could be trusted; that the other individual (Duane Harris) was also a friend, was also part of the organization and could be trusted, that one of the reasons his brother was there was that he had to rely on his brother for transportation as his right to operate was suspended. (Tr 32, 340-42)

Wayne Holden and Agent Anderson then discussed a future meeting with the chemist, ingredients needed for the manufacturing process and a future meeting between Wayne Holden and Agent Anderson. (Tr 32-33) Wayne Holden then gave Agent Anderson a telephone number where he could be reached, 802-365-7628*, (Tr 33-34; GX1). While leaving the bar, Agent Anderson observed Wayne Holden walking toward the table where Norman Holden and Harris were seated. (Tr 38) Shortly thereafter Wayne Holden

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* 802-365-7628 was subscribed to by Luetta M. Holden, the mother of Norman and Wayne Holden. (Tr 548-49; DB 17)

left the bar (Tr 38) and Wayne Holden drove with Agent Anderson in a gray car, Vermont registration number Y1382 (Tr 38-39) registered to Norman Holden, (Tr 488-90; GX 39) to the front of the motel portion of the Red Coach Motor Inn (Tr 38). Both Wayne Holden and Agent Anderson entered Anderson's Government vehicle and Wayne Holden took delivery of four 500 gram bottles of P2P (Tr 39-40, 433-35) and arrangements were made for Agent Anderson to contact Wayne Holden by telephone the next day (Tr 41-42). Later that evening Norman Holden, Wayne Holden and Duane Harris left the Discotheque Bar together. (Tr 591-92, 595)

On June 8, 1975 Agent Anderson called Wayne Holden at the telephone number provided him by Wayne Holden - 365-7628 - and they discussed when the manufacturing process of amphetamine would begin. (Tr 43-44) Based on a prior arrangement, Agent Anderson called Wayne Holden at this same number on June 11, and Wayne Holden was not there. (Tr 44-45)

On June 13, 1975 sometime between 9:00-9:30 P.M. Agent Anderson placed a telephone call to Wayne Holden at the 365-7628 number and an individual who identified himself as Duane Harris answered. (Tr 45, 294, 368-69)

Harris told Anderson that Wayne Holden had not returned with the amphetamine, but that he was expected later that night, and that Wayne Holden had asked to meet Anderson at the Discotheque Bar the following evening to deliver the amphetamine. (Tr 45-46, 294-95) When Agent Anderson said he would call back, Harris said he (Harris) would be at that number answering the telephone. (Tr 46, 293-94)

When Agent Anderson called later on June 13, Duane Harris again answered the telephone, (Tr 46, 293-94) and Agent Anderson testified about the ensuing conversation as follows:

> Q: What was the subject of the conversation on that occasion?
>
> A: At that particular time he related that Wayne Holden had not as yet returned. We then entered into a discussion. I told him I was very displeased at the way things were materializing, that the delivery of amphetamine back to me was being delayed and I felt either the chemist was very inexperienced or something to the effect that the Holdens were unreliable in this particular transaction.
>
> * * *
>
> Q: What if anything did Mr. Harris say after you finished that statement you just made?

A: Mr. Harris stated to me the chemist was not inexperienced. He had been acquainted with the chemist for a longer period of time than what the Holdens had and he had initially introduced the Holdens to the chemist.

Q: What, if anything, did Mr. Harris say concerning the confidence of the chemist in the Holdens?

A: I believe at that time Mr. Harris stated the chemist also had some reservations or doubts, or something to that affect, concerning the Holdens' reliability.

Q: Did you thereafter, make a statement about meeting with the chemist?

A: Yes, at that particular time, I asked Mr. Harris, or asked Mr. Harris if it would be possible for me to meet with the chemist and perhaps eliminate going through this difficulty. He indicated to me he would speak to the chemist and see if a meeting could be arranged.

Q: What arrangements, if any, were made for future contact?

A: I believe at that particular time I told Mr. Harris I would telephone again sometime during the course of the weekend to speak with Wayne Holden.

(Tr 46-48, 367-69)

On June 15, Agent Anderson called Wayne Holden and they arranged a meeting for the delivery of amphetamine (Tr 50). That meeting took place on June 16 at the McDonald's parking lot on Route 5 in Brattleboro. (Tr 51) Wayne Holden, a passenger in a car driven and owned by Guy Pennell, delivered to Agent Anderson approximately 83 grams of amphetamine, (Tr 52-56, 297, 490, 517; GX 40), the subject of Count I of the indictment.

On June 27, Agent Anderson telephonically arranged a meeting with Wayne Holden at the Mammoth Mart Shopping

Plaza. (Tr 60-61, 72; GX 3A) Norman Holden drove Wayne Holden to this meeting in a gray car registered to Norman Holden, (Tr 73, 78, 488-90; GX 39) At the meeting Agent Anderson delivered to Wayne Holden one 500 gram bottle of P2P (Tr 74, 519). Agent Anderson also gave Wayne Holden his undercover phone number - 203-522-9065. (Tr 75) On June 30, Wayne Holden called Agent Anderson on the undercover phone (Tr 76) and arranged for a meeting at the Mammoth Mart Shopping Plaza for the delivery of amphetamine (Tr 77). Later that day Norman and Wayne Holden arrived at the Plaza in the same gray car and delivered to Agent Anderson 144 grams of amphetamine. (Tr 78-79, 219) Agent Anderson gave Wayne Holden two bottles of P2P and made arrangements for a future phone call. (Tr 81) On July 2, Wayne Holden called Agent Anderson and set up a delivery for July 7. (Tr 85) On July 7, Agent Anderson called Wayne Holden; Norman Holden answered and said that Wayne was not home but that Wayne would contact Agent Anderson later concerning delivery. (Tr 86) Later on July 7, Wayne Holden called Agent Anderson and stated the amphetamine was ready and that the chemist wanted a full case of P2P. Arrangements were then made for a meeting at the Mammoth Mart Plaza. (Tr 86, 613) Later that day Wayne Holden, driving a car registered

to Duane Harris and accompanied by Annie Harris, (Tr 88, 487-88, 613; GX 37) delivered 330 grams of amphetamine to Agent Anderson and made arrangements for a future P2P delivery. (Tr 90-91, 220; GX 6)

On July 9, Agent Anderson called Wayne Holden and made arrangements for a delivery of P2P on July 10th at the Mammoth Mart Plaza (Tr 92-93). On July 10th, Wayne Holden, again accompanied by Norman Holden and again in the same car registered to Duane Harris met Agent Anderson at the Plaza. (Tr 94) After arranging to meet at the First National parking lot for a delivery of amphetamine, Agent Anderson then delivered two 500 gram bottles of P2P to Wayne Holden (Tr 95-96). Thereafter, Norman Holden and Wayne Holden drove this car which was registered to Duane Harris from Brattleboro, Vermont to Gloucester, Massachusetts. (Tr 443-46, 521-22, 557-58; GX 47)

On July 14th phone calls were exchanged between Agent Anderson and Wayne Holden and a meeting was arranged for July 15. (Tr 96-97) On July 15th Wayne Holden, in a car driven and registered to Bruce Garland, delivered 308 grams of amphetamine to Agent Anderson. (Tr 98-101, 110-14, 221, 447-49, 488; GX 7, 38)

On July 17th, Agent Anderson called Wayne Holden at the 365-7628 number; Duane Harris answered the phone and told Agent Anderson that Wayne Holden was at 802-365-

4021. (Tr 115-16) Between July 21st and Auguust 12th there were three phone conversations between Agent Anderson and Wayne Holden. (Tr 118-22)

On September 12th, Agent Anderson called 365-7628 and spoke with Duane Harris who told Agent Anderson that "Wayne Holden was not living at that particular address but on Action Hill and, there was no telephone at the Action Hill location." (Tr 122, 298-99) Agent Anderson asked Harris to leave a message that he (Anderson) had telephoned and to get that information to Holden. (Tr 122, 298-99) Agent Anderson might have asked Harris to tell Holden to contact Anderson at the undercover phone number. (Tr 299)

On September 15th, Agent Anderson called 365-7628 and Norman Holden answered. Thereafter Wayne Holden called Agent Anderson. (Tr 137)

On September 22nd Agent Anderson called 365-7628 and taped a phone conversation with Wayne Holden (Tr 139)

which made reference to Duane Harris as follows:

Anderson: Now I can usually reach you at this number without any problem, right?

W.Holden: Or, at Duane's, me or Duane. Duane's the other guy who usually talks to you.

Anderson: Oh yeah, yeah, okay.

Holden: He stays here. I don't live here, but this is my mother's place. I usually come in and out every day.

Anderson: Yeah.

Holden: You leave a message that Bob called, either call you or else say when you're gonna call back.

(Tr 143; GX 9A)

On September 23, Agent Anderson made two phone calls to 365-7628 and made arrangements for a delivery of P2P. (Tr 144-45) On September 24, Agent Anderson delivered three bottles of P2P to Wayne Holden at the Mammoth Mart Plaza. (Tr 145-47, 449-51) Wayne Holden was driving a vehicle registered to his brother, Norman, and was accompanied by an unidentified male and female. (Tr 450, 488-90; GX 39)

On September 30, Agent Anderson received a call from Wayne Holden and arranged a meeting for the delivery of amphetamine. (Tr 170; GX 11A) On that same day Wayne Holden, driving a vehicle registered to Duane Harris (Tr

178, 487-88; GX 37) delivered 996 grams of amphetamine to Agent Anderson (Tr 179; GX 12, 45). Agent Anderson arrested Wayne Holden at that time. (Tr 179-80, 452-53)

During the early morning hours of October 1st, Harris was arrested in East Jamaica, Vermont, at the mobile home residence of his mother where he was sleeping on the couch. (Tr 603-04, 607) After being advised of his constitutional rights and while being transported to the West Brattleboro, Vermont State Police Barracks, Harris said "it was a good thing we came that night, because the next day he was going to head for Mexico* (Tr 605, 617, 636) because he felt something was going to happen (Tr 636), that he felt something was wrong, he smelled something coming. (Tr 617)

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* Harris' mother testified that she and her family were planning to go to Mexico and the West Coast and that the trip took place on either the 30th of October or the 1st of November. (Tr 696-97) There is no direct evidence that Harris was to be part of this trip or that it was scheduled for October 1st as defendant seems to argue in his statement of facts. (DB 16) As a matter of fact, Mrs. Harris testified the planning for the trip took place in September and October. (Tr 696)

Harris also stated that he had a conversation with Wayne (Wayne Holden) earlier in the day and that Wayne had asked him if he had seen any "fedish"* around; Harris said he told Wayne he had not, but that is what they would have to worry about. (Tr 606, 609, 618) Harris also stated that he didn't make any money out of the deal. (Tr 606, 609, 617, 637-38) When Agent Burttram of the Drug Enforcement Administration told Harris he was pretty stupid for having involved himself in the transaction with Holden if, in fact, he had not made any money, Harris said he probably should have learned to make violins rather than getting involved. (Tr 617-18, 638)

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* "Fedish" refers to Federal Agents. (Tr 606)

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY.

The defendant Duane Harris was found guilty by the jury of Counts I and XVI of the indictment charging him with aiding and abetting in the possession and possession with intent to distribute approximately 83 grams of amphetamine on June 15, 1975 and conspiracy to manufacture amphetamine, conspiracy to distribute and possess with intent to distribute quantities of amphetamine and conspiracy to use communications facilities in committing and in causing and facilitating the knowing and intentional distribution and possession with intent to distribute quantities of amphetamine. Harris contends that the trial judge erred in refusing to grant a motion for acquittal based upon the alleged insufficiency of the evidence. (DB 26)

The standard in this Circuit for determining whether to permit a case to be decided by the jury was set forth in United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), quoting Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947), cert. denied, 331 U.S. 837 , reh. denied, 331 U.S. 869.

> The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilty beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

The Court in Taylor clearly focused on the fact-finding function of the jury:

> . . .But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.

Taylor at 243, quoting Curley at 932.

The jury is to consider all the evidence introduced, direct as well as circumstantial, United States v. Bowles, 428 F.2d 592, 597 (2d Cir. 1970), cert. denied, 400 U.S. 928 and all reasonable inferences therefrom. Taylor, supra, at 244-5. The same standard as this Court stated in Taylor, supra, applies where circumstantial evidence of guilt is presented:

> We in no way subscribe to the doctrine that "where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt." which continues to be frequently urged by defense lawyers despite the Supreme Court's repudiation of it in Holland v. United States, 348 U.S. 121, 139-140, 75 S. Ct. 127, 137, 99 L.Ed. 150 (1954).

464 F.2d at 244.

As this Court stated in Bowles, supra:

> Circumstantial evidence is of no less probative value than testimonial evidence. . .The question is always whether the jury may rationally and logically infer the ultimate fact to be proved from basic facts, whether established by circumstantial or testimonial evidence,and the surrounding circumstances of the case.

428 F.2d at 597.

Defendant Harris contends that the Government's evidence was insufficient as a matter of law and therefore the trial court erred in allowing Count I to go to the jury on an aiding and abetting theory. (DB 19-20, 26)

In Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), the Supreme Court, quoting from Judge Learned Hand in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), stated:

> In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his own action to make it succeed.'"

See also United States Licursi, 525 F.2d 1164, 1167 (2d Cir. 1975); United States v. Terrell, 474 F.2d 872, 875 (2d Cir. 1973); United States v. Manna, 353 F.2d 191, 192 (2d Cir. 1965), cert. denied, 384 U.S. 975 (1966), reh. denied, 385 U.S. 893.

This means that the defendant must consciously assist the commission of the specific crime in some affirmative or active way. United States v. Dickerson, 508 F.2d 1216, 1218 (2d Cir. 1975); United States v. Wiebold, 507 F.2d 932, 934 (8th Cir. 1974). See also United States v. Baumgarten, 517 F.2d 1020, 1027 (8th Cir. 1975), cert. denied, 423 U.S. 878; United States v. Harris, 441 F.2d 1333, 1336 (10th Cir. 1971).

The evidence and all reasonable inferences therefrom clearly showed Harris aided and abetted the possession with intent to distribute amphetamine on June 16, 1975.

On June 5, Wayne and Norman Holden met with Agent Anderson for the express purpose of arranging an illegal drug transaction; Duane Harris was there with both Wayne and Norman Holden. (Tr 22-23) Duane Harris was not there for transportation purposes as the car Wayne Holden drove was registered to Norman Holden (Tr 38-39, 488-90, GX 39) and as Wayne Holden explained - he needed his brother for transportation. (Tr 32, 340-42) Duane Harris was not seated with Wayne Holden and Norman Holden by chance since he arrived with and left with both Norman and Wayne Holden. (Tr 23, 591-92, 595) Wayne Holden also said that Harris was a friend who was part of the organization and could be trusted. (Tr 32) Wayne Holden gave Agent Anderson a telephone number where he could be reached.* (Tr 33-34, GX 1). This number was subscribed to by Wayne and Norman Holden's mother (Tr 548-49; DB 17); however, the evidence showed that Wayne Holden did not even live at this number but that Harris lived there. (Tr 143; GX 9A) On June 13,, Harris told Agent Anderson that Wayne Holden was not there but he (Harris) would be at that number answering the telephone. (Tr 46, 293-94) It is certainly reasonable to infer that Harris was relaying messages concerning the sale of narcotics between Holden and Anderson.

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* (802) 365-7628

There is ample evidence that Harris knew of the criminal activity. During the first June 13 phone call Agent Anderson asked Harris if Wayne Holden had returned with the amphetamine and Harris said no. (Tr 294-95) During the second June 13 phone call when Agent Anderson told Harris he was displeased with the delay in the delivery of amphetamine, Harris indicated he had been acquainted with the chemist longer than the Holdens had since he had initially introduced the Holdens to the chemist. (Tr 46-47, 367-68) Furthermore, Harris indicated he still had contact with the chemist and could arrange a meeting between the chemist and Agent Anderson. (Tr 48)

Harris argues, and places great reliance on the contention that "there was no evidence that he (Harris) even passed on the message to call Anderson as requested by Anderson." (DB 21) This is clearly a reference to the phone conversation on September 12 between Agent Anderson and Harris, (Tr 298-299) since Agent Anderson did not ask Harris to pass on a message for Holden to call him during either June 13 conversation. (Tr 45-48) However, during the first June 13 phone conversation Harris told Agent Anderson that Wayne Holden wanted to meet Anderson the following evening to deliver the amphetamine. (Tr 45-46, 295) This information conveyed by Harris actively aided

the actual delivery of amphetamine to Agent Anderson which took place on June 16th. (Count I) Harris was an active contact between Holden and Anderson in furtherance of these illegal drug activities, as evidenced also by the September 22 phone conversation between Agent Anderson and Wayne Holden where Wayne Holden stated Anderson could always reach him or Duane at the 365-7628 number.

The law is clear that evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime and participation may be proved by circumstantial evidence. United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962).

In United States v. Bradley, 421 F.2d 924 (6th Cir. 1970) the defendant Calvert was convicted of aiding a robbery and this conviction was upheld based upon the following facts: there was evidence that Calvert placed burglar tools in a car observed at the scene of the crime; the car's license plates came from a junk yard where he had previously been employed; and he had purchased the cutting tips used in the robbery and these were found in the car. There was no evidence that Calvert was at the scene of the crime.

In United States v. Baumgarten, 517 F.2d 1020 (8th Cir. 1975), cert. denied, 423 U.S. 878 the defendant Baumgarten was convicted of aiding and abetting offenses connected with a series of bombings and this conviction was upheld on the following facts: Baumgarten on two separate occasions, after co-defendant Stead had told him he had committed some bombings, drove Stead to a gun shop and a Sears store, where Stead purchased gunpowder, pipe, and pipe caps. In addition, Baumgarten aided Stead by picking up and delivering to him a drill that was used in the making of a pipe bomb. The court held that the jury could reasonably infer that Baumgarten's actions, such as driving Stead to Sears, accompanying him to the gun shop, and picking up the electric drill for him constituted sufficient affirmative participation and facilitation of the unlawful act for purposes of an aiding and abetting charge. Id. at 1027.

In United States v. Priest, 419 F.2d 570 (10th Cir. 1970) the Government's evidence showed a prearranged meeting of Small and a DEA agent at a lounge. Priest joined them at a booth and Small introduced Priest to the agent. The three discussed the possible purchase of marihuana by the agent. When the agent told Priest he was dissatisfied with the quantity and quality of a former

purchase of marihuana from Small, Priest told the agent that the product to be purchased at this time was of much better quality. When the conversation in the booth had been completed, Priest advised Small not to make the proposed transfer from his car to the agent in a nearby parking lot because it was then under observation by the police department; he farther advised Small to drive a couple of blocks away before making the transfer. Priest admitted that he was present during the discussion about the marihuana, but maintained that he was there only as a friend of Small and had nothing to do with the sale or transfer of any marihuana and was not present at the time the marihuana was transferred. This is the same "knew what was going on and was inclined to be helpful" argument that Harris makes. (DB 21) The court held that the jury was free to infer from the testimony of the agent that Priest not only desired that the transaction be consummated, but associated himself with Small in making the sale. Id. at 571-72.

Harris makes the same arguments regarding insufficiency of evidence with respect to the conspiracy count (Count XVI). (DB 22)

A conspiracy is a combination of persons to accomplish by concerted action a purpose either criminal or unlawful. United States v. Hutto, 256 U.S. 524, 528-29 (1921); Pettibone v. United States, 148 U.S. 197, 203 (1893).

Harris concedes that a conspiracy existed and that he knew of the plan or agreement. (DB 22) Thus the issue left is whether, viewing the evidence in the light most favorable to the Government, Harris was a member of this conspiracy.

The law is clear that when proof of a conspiracy is shown, only slight additional evidence is necessary to connect a particular defendant with it. United States v. Marrapese, 486 F.2d 918 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974). The Government merely had to show a "likelihood of illicit association" between Harris and the co-conspirators. United States v. Mejias, Nos 76-1384-1389, 76-1395 (2d Cir.,Mar. 10, 1977) Once a conspiracy is established, it is considered to continue until shown to terminate, and each conspirator is presumed to continue as a member until such time as his withdrawal is demonstrated or the conspiracy ends. United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). Thus the Government must show that Harris entered in, participated in, furthered or intended to participate in the conspiracy. United States v. Steinberg, 525 F.2d 1126, 1133 (2d Cir. 1975), cert. denied, ___ U.S. ___ ; United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974), cert. denied, 419 U.S. 1056.

It is well established law in the Second Circuit that in a conspiracy trial the trial judge must find from independent evidence the existence of a conspiracy and the defendant's participation in it before hearsay statements of co-conspirators are admissible against him. United States v. Wiley, 519 F.2d 1348, 1350 (2d Cir. 1975), cert. denied, 423 U.S. 1058; United States v. Cefaro, 455 F.2d 323, 326 (2d Cir. 1972), cert. denied, 406 U.S. 918. As the Second Circuit clearly indicated in United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), the trial court may allow all hearsay statements of co-conspirators to come into evidence subject to the later proof under the appropriate standard of a conspiracy and the defendant's participation:

> While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in a conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt.

Accord, United States v. Cefaro, supra.

The independent non-hearsay evidence introduced at trial to show a conspiracy and Harris' part in it included the following facts: on July 7, Wayne Holden, driving a car registered to Harris, delivered 330 grams of amphetamine to Agent Anderson. (Tr 90-91, 220; GX 6) On July 10, Wayne Holden, again driving a car registered to Harris, received two bottles of P2P from Agent Anderson in Brattleboro, Vermont and both Norman and Wayne Holden drove this car to Gloucester, Massachusetts that same day. (Tr 95-96, 443-46, 521-22, 557-58; GX 37, 47) Similarly, on September 30, Wayne Holden, driving a vehicle registered to Harris, delivered 996 grams of amphetamine to Agent Anderson. (Tr 178, 487-88; GX 37)

On July 17, when Agent Anderson called the 365-7628 number Harris answered the phone and gave Anderson a number where Holden could be reached. (Tr 117-16) On September 12, Harris answered the phone, gave Anderson Holden's address and volunterred the fact that he had no telephone at that address. (Tr 122) Certainly this is more than merely answering a phone and saying the party isn't there as argued by Harris. (DB 25)

Harris claims that he did nothing and certainly did not relay messages. (DB 25) The jury could certainly believe otherwise based on the September 22nd phone conversation between Agent Anderson and Wayne Holden where Holden made it clear that Anderson could leave messages with Harris. (Tr 143; GX 9A)

Shortly after Harris was arrested on October 1st he said it was a good thing we (federal agents) came that night, because the next day he was going to head for Mexico because he felt something was going to happen, that he felt something was wrong, he smelled something coming. (Tr 605, 617, 636) During this statement Harris told the arresting officers that he probably should have learned to make violins rather than getting involved. (Tr 618) Harris also explained that he had stated to Wayne Holden that they only had to worry when they didn't see the "fedish." (Tr 606, 609, 618) Certainly the jury could infer from these statements that Harris knew of the conspiracy and participated in it.

Harris argues that "there was direct evidence that he did not get anything out of it." (DB 24) The record is clear that Harris stated that he didn't make any money out

of the drug sales and conspiracy, not that he hadn't gotten anything out of it. (Tr 606, 609, 617, 637-38) It is not necessary that an aider and abettor have a direct financial interest in the transactions, only that he seek to make the venture succeed. United States v. Manna, 353 F.2d 191, 193 (2d Cir. 1965), cert. denied, 384 U.S. 975 (1966), reh. denied, 385 U.S. 893.

The evidence was sufficient to find, as Judge Coffrin implicitly did, (Tr 706, 707) that a conspiracy existed and Harris was part of it. As such, statements of his co-conspirators were admissible against him,* United States v. Wiley, supra, regardless of what time he joined the conspiracy. United States v. Sansone, 231 F.2d 887, 892 (2d Cir. 1956), cert. denied, 351 U.S. 987.

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* The evidence for submission of a conspiracy count to the jury must meet a higher test than the test for irdependent evidence required for admission of hearsay declarations. See United States v. Stanchich, No. 76-1407 (2d Cir., Jan. 6, 1977).

Harris cites two cases to support his argument that the evidence that he was a co-conspirator was insufficient to go to the jury, i.e., United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963); United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, ___ U.S. ___ .

In United States v. Cianchetti, supra, defendant Cianchetti's conviction as a co-conspirator was reversed where the evidence showed that he knew of the conspiracy and discussed the problems of drug distribution but abstained from going any further. Similarly, in United States v. Steinberg, supra, the defendant Kaye's conviction for conspiracy was reversed since the evidence showed only knowledge of the conspiracy and a disassociation from it. Defendant Parker did purchase a quantity of drugs from the major conspirator but Parker's conviction was reversed because there was no proof that this was part of the operation of the conspiracy. Cianchetti and Steinberg are similar to the instant case only by virtue of the fact that Harris knew of the conspiracy and discussed aspects of it. Harris' involvement goes much farther than the successful appellants in those cases. A car registered to Harris was used for drug transactions on July 7th,

July 10th and September 30th. Harris actively acted as an intermediary between Agent Anderson and Wayne Holden to set up deliveries of P2P and amphetamine. Statements by co-conspirator Wayne Holden on June 5 and September 22 as well as the post arrest statements of Harris showed his active involvement and participation. The Government contends that Cianchetti and Steinberg are not controlling as each case depends on its facts and the facts in those cases are not controlling here. See, e.g., United States v. MacDougal-Pena, 545 F.2d 833 (2d Cir. 1976)

The Government contends that the evidence, viewed in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Marrapese, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974), was clearly sufficient "from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty." United States v. Glasser, 443 F.2d 994, 1006 (2d Cir. 1971), cert. denied, 404 U.S. 854, quoting American Tobacco Co. v. United States, 328 U.S. 781, 787 n. 4 (1946).

II

THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE THAT HARRIS WAS PART OF THE ORGANIZATION.

Harris contends that the trial court erred in admitting a statement of co-conspirator Wayne Holden that Harris was a part of the organization. (DB 31)

At the June 5 meeting Agent Anderson expressed concern to Wayne Holden about the presence of other people there that evening:

> A: I expressed to Mr. Wayne Holden I was upset that other people were present, that I was not interested in meeting a lot of other individuals and he assured me that one of the individuals was his brother who was part of the organization and could be trusted; that the other individual* was also a friend, was also part of the organization and could be trusted. . ." (Tr 32)

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* Harris concedes that there was no question that the "other individual" referred to as being part of the organization was Harris. (DB 26-27)

On the redirect examination of Agent Anderson the following colloquy took place. (Tr 356)

> Q: Without naming names how would you describe the class or types of persons you were attempting to gather evidence with respect to?
>
> A: The scope of the investigation was to include anyone we could identify that was involved in the illegal manufacture, transportation of drugs, or procurement of chemicals in this particular organization.

At this time Harris objected to the use of the term "organization" and the Court struck the word "organization" (Tr 357) based upon his ruling that "[a]ny group of individuals have not been identified in this case as being part of any organization." (Tr 362)

Later in the trial, (Tr 672), Harris, for the first time, moved to strike the testimony of the June 5 conversation pertaining to the word organization. This motion was denied by the Court. (Tr 676)

It is clear that the word "organization" striken by the Court (Tr 357) was a characterization by Agent Anderson (Tr 356). However, the word "organization" not striken by the Court (Tr 32) was included in a statement made by co-conspirator Wayne Holden. There was sufficient evidence to find that Harris participated in the conspiracy. (See GB 23-26,31-36) As such, the statement of co-conspirator Wayne Holden was admissible against Harris. United States v. Wiley, supra.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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March 18, 1977

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

v. Docket No. 76-1382

DUANE HARRIS

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of March, 1977, mailed 2 copies of the attached Government's Brief to Robert Grussing, Esq., counsel for Appellant, postage prepaid, Main Street, Brattleboro, Vermont 05301.

John R. Hughes Jr.

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Enclosures (2)